

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HOWARD VINCENT BROWN,

Petitioner,

vs.

BRIAN WILLIAMS, *et al.*,

Respondents.

2:13-cv-00253-GMN-NJK

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner.

The petition in the instant action challenges petitioner's state conviction in case number 01C178401 in the Eighth Judicial District for the State of Nevada. Petitioner previously challenged this same state conviction with a § 2254 federal habeas petition in this Court, filed under case number 2:04-cv-01539-KJD-PAL. The petition in case number 2:04-cv-01539-KJD-PAL was reviewed on the merits and denied by order filed March 25, 2008. (ECF No. 57). Judgment was entered the same date. (ECF No. 58). Petitioner appealed. (ECF No. 59). By order filed March 9, 2009, the United States Court of Appeals for the Ninth Circuit denied petitioner a certificate of appealability and denied all motions on appeal. (ECF No. 80).

"Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(3)(A). The instant petition is a successive petition, which requires petitioner to seek and obtain leave of the Ninth Circuit Court of Appeal to pursue. *See* 28 U.S.C. § 2244(b)(3) *et seq.* In the prior habeas case in which petitioner challenged his conviction (case number 2:04-cv-01539-KJD-PAL), the Court reviewed the merits of the petition and denied the petition by order filed March 25, 2008. (ECF No. 57). Because the prior habeas

1 corpus petition was decided on the merits, the instant habeas petition is a successive petition.

2 *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009).

3 On May 7, 2013, this Court entered an order requiring petitioner to show cause why this
4 action should not be dismissed as a successive petition. (ECF No. 6). Petitioner filed an affidavit in
5 response to the Court's order (ECF No. 7), but petitioner has not demonstrated that he has obtained
6 leave to file a successive petition from the Ninth Circuit Court of Appeals. Therefore, the instant
7 petition will be dismissed as successive.

8 In order to proceed with any appeal, petitioner must receive a certificate of appealability.
9 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-
10 951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). District
11 courts are required to rule on the certificate of appealability in the order disposing of a proceeding
12 adversely to the petitioner or movant, rather than waiting for a notice of appeal and request for
13 certificate of appealability to be filed. Rule 11(a) of the Rules Governing Section 2254 and 2255
14 Cases. Generally, a petitioner must make "a substantial showing of the denial of a constitutional
15 right" to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S.
16 473, 483-84 (2000). "The petitioner must demonstrate that reasonable jurists would find the district
17 court's assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at
18 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the
19 issues are debatable among jurists of reason; that a court could resolve the issues differently; or that
20 the questions are adequate to deserve encouragement to proceed further. *Id.* In this case, no
21 reasonable jurist would find this Court's dismissal of the petition debatable or wrong. The Court
22 therefore denies petitioner a certificate of appealability.

23 **IT IS THEREFORE ORDERED** that this action is **DISMISSED** as a successive petition.

24 **IT IS FURTHER ORDERED** that all pending motions, including petitioner's motion for
25 the appointment of counsel (ECF No. 2), are **DENIED**.

26 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**

1 **APPEALABILITY.**

2 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT** accordingly.

3 Dated this 21st day of August, 2013.

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6 Gloria M. Navarro
7 United States District Judge
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